A

LEA WAH ENTERPRISE SDN BHD

v.

TAI SING CHU

B

HIGH COURT SABAH & SARAWAK, SIBU
YEW JEN KIE J
[CIVIL APPEAL NO: SBW-12A-4-12-2011]
22 JUNE 2012

C ***CIVIL PROCEDURE:*** *Particulars - Further and better particulars - Service out of time prescribed in court order - Whether against 'unless' order - Whether trial court functus officio - Whether rendered subsequent extension of time invalid - Whether intentional and contumelious flouting of order*

D ***CIVIL PROCEDURE:*** *Judgments and orders - Unless orders - Effect of - Whether disposed rights of parties - Whether rendered court functus officio - Whether court could still entertain application for extension of time*

E The respondent ('the plaintiff') filed a suit against the appellant ('the defendant') in the Sessions Court in relation to certain goods which was sold and delivered to the defendant. The defendant applied for further and better particulars from the plaintiff and on 25 August 2011, the Sessions Court ordered ('the Order'), *inter alia*, that the plaintiff do furnish the particulars as requested by
F the defendant. The court also stipulated that unless such particulars were served within 14 days from the date of the court Order, the action would stand to be dismissed. However, the plaintiff did not comply with the Order and had only served the particulars to the defendant on 20 September 2011, *ie*, 12 days
G outside the prescribed time. The Sessions Court allowed the plaintiff's application for extension of time to provide further and better particulars. Dissatisfied with the decision, the defendant appealed to this court. The defendant contended, *inter ali*a, that (i) the Sessions Court was already *functus officio*; (ii) the plaintiff's
H action stood dismissed; and (iii) there was no longer any proceedings before the Sessions Court.

Held (dismissing appeal with costs):

I **(1)** The case had neither gone beyond the stage of pleading nor a trial for judicial determination on the merits. If the defendant's argument, that the plaintiff had breached the conditions of the order and thus by operation of the unless

order the plaintiff's action had been dismissed, was accepted, it meant that the defendant would stand to enjoy the windfall of not having to defend the plaintiff's action that had been dismissed without any judicial consideration on the merits. (paras 9 & 10)

(2) An unless order does not preclude the court from hearing the defaulting party's application for extension of time for compliance with the order. Even if the action was dismissed or struck out due to operation of the unless order, the court has the power to resurrect it. To achieve this and to ensure that the punishment fits the default, the court must consider the character of the default's conduct as to whether it was intentional or contumacious in failing to comply with the order. (paras 23 & 33)

(3) The court did not find that the Session court had fallen into error in holding that the court was not *functus officio*. Hence, this ground of appeal failed. (paras 10, 24 & 33)

(4) There must be intentional or contumelious flouting of the Order by the plaintiff. However, the court did not see that attitude being exhibited and quite to the contrary, there appeared every intention to obey the Order. Realising that the time period given was insufficient, the plaintiff's counsel had sought an extension of time from the defendant's counsel and consent was given. (para 30)

(5) The conduct of the plaintiff showed that he had taken the required steps in good faith to comply with the Order but was still not able to do so. The plaintiff had on 20 September 2012 (12 days from 10 September 2012 but before the expiry of the extended time agreed to by the defendant's counsel) delivered the particulars/documents sought by the defendant. In the premise, a punishment in accordance with the strict stipulation in the Order would be too harsh and did not fit the breach. (para 32)

(6) Upon examination of the character of the breach which did not show an intentional or contumelious flouting of the Order, an order of extension of time as prayed by the plaintiff was in place. (para 33)

Case(s) referred to:

Datuk Hussain Mohamed v. First Malaysia Finance Bhd & Anor (Bank Negara Mals, Intervener) [1990] 1 CLJ 258; [1990] 1 CLJ (Rep) 802 HC ***(dist)***

Hytec Information Systems Ltd v. Coventry City Council [1997] 1 WLR 1666 ***(refd)***

Md Amin Md Yusof & Anor v. Cityvilla Sdn Bhd [2004] 3 CLJ 88 CA ***(refd)***

Plenitude Holdings Sdn Bhd v. Tan Sri Khoo Teck Puat and Anor [1993] 3 CLJ 653 HC ***(dist)***

*R v. Bloomsbury and Marylebone County Court, ex parte Villerwest Ltd [1976] 1 All ER 897****(refd)***

Re Jokai Tea Holdings Ltd (Note) [1992] 1 WLR 196 ***(refd)***

Reiss v. Woolf [1952] 2 All ER 112 ***(refd)***

Samuels v. Linzi Dresses Ltd [1981] 1 QB 115 ***(refd)***

Tee Ha Leong v. Tetuan Low & Lim & Anor [2005] 2 CLJ 78 HC ***(refd)***

Yogananthy AS Thambaiya v. Idris Othman [2010] 5 CLJ 654 CA ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 53 r. 8(1)

Rules of the High Court 1980, O. 15 r. 6(2)(b)(i), O. 35 r. 2(1)

For the defendant/appellant - Adrian Lee Chew; M/s Battenberg & Talma Advocates

For the plaintiff/respondent - Belinda Hii; M/s Hii & Hii Advocates

Reported by Kumitha Abd Majid

JUDGMENT

Yew Jen Kie J:

[1] In this appeal, the court shall refer to the parties as they are described in the original suit.

[2] This is the defendant's appeal against the decision of the learned Sessions Court Judge, given on 17 November 2011, in allowing the plaintiff's application for extension of time to provide further and better particulars.

[3] The facts leading to the appeal are as follows:

(a) The plaintiff claimed against the defendant for the sum of RM35,436.70 being the balance of the price of the goods sold supplied and delivered to the defendant.

(b) The defendant applied for further and better particulars from the plaintiff and on 25 August 2011, the Sessions Court ordered, *inter alia*, that the plaintiff do furnish the particulars requested by the defendant and it stipulated that unless such particulars were served within 14 days (that is, before 9 September 2011) from the date of the court order, the action would stand to be dismissed with costs.

(c) The plaintiff did not comply with the Order and only served the defendant with the particulars on 20 September 2011, that is, 12 days outside the prescribed time limitation.

(d) On 21 September 2011, the plaintiff filed an application for summary judgment against the defendant, which was subsequently dismissed with costs to the defendant.

(e) On 27 September 2011, the plaintiff filed an application for extension of time to provide further and better particulars, which was granted by the learned Sessions Court Judge. Hence this appeal.

The Defendant's Contention

[4] The primary complaint in this appeal is that the Sessions Court is already *functus officio* and the plaintiff's action had stood dismissed and there is no longer any proceedings before the Sessions Court.

[5] The defendant is saying that when the plaintiff failed to comply with the court order dated 25 August 2010 by not serving the further and better particulars before 9 September 2011, the plaintiff's action has stood to be dismissed with costs from then onward as ordered by the court. Accordingly, the Sessions Court is *functus officio* and has no more jurisdictions to hear the plaintiff's application for extension of time or any application. To put in another way, the "unless" order made on 25 August 2011 has the effect of finally disposing of the rights of the parties by bringing the proceedings to an end by dismissing it, citing *Datuk Hussain Mohamed v. First Malaysia Finance Bhd & Anor (Bank Negara Mals, Intervener)* [1990] 2 MTC 96; [1990] 2 BLJ 96; [1990] 1 MLJ 369 and *Plenitude Holdings Sdn Bhd v. Tan Sri Khoo Teck Puat and Anor* [1993] 3 CLJ 653; [1993] 2 MLJ 469 for support.

[6] In *Datuk Hussain Mohamed*, Siti Norma Yaakob J (as she then was) opined that a court becomes *functus officio* once the rights of the parties have been determined as to the effect of each proceedings is to bring all proceedings to an end.

[7] In *Plenitude Holdings*, PS Gill J (as he then was) held that the court is *functus officio* once judgment on the merits of the case had been pronounced.

[8] Learned counsel for the defendant further contended that the legal effect of a dismissal was discussed and made clear in *Tee Ha Leong v. Tetuan Low & Lim & Anor* [2005] 2 CLJ 78; [2005] 4 MLJ 426 (HC), where James Foong J (as he then was) opined:

> By the manner and approach adopted in this application, the plaintiff is treating the order of the court handed down on 21 September 2004 as a striking out order. This is not a correct reflection. To reiterate, this case was not struck out on 21 September 2004; it was dismissed. This means that when the plaintiff was called upon to present his case on the merits, he could not do so. The effect of this 'is the same as if it were a judgment dismissing the action on merits' – see *Mallal's Supreme Court Practice*, (2nd Ed) at p 423 citing the case of *Armour v. Bate* [1891] 2 QB 23.

[9] From my understanding of the defendant's argument, the defendant's stance is that the plaintiff had clearly breached the condition of the order and by operation of the unless order itself, the plaintiff's action has been dismissed, meaning the case no longer exists. Thus, the court is *functus officio* and cannot entertain any application for extension of time for compliance. The only avenue opens to the plaintiff is to appeal. This is based on the rational that the case was already heard on merits.

[10] With respect, I cannot agree that the court is *functus officio.* The two authorities relied on by the defendant amply show that the court is *functus officio* where judgment has been pronounced on the rights of the parties based on the merits of the case. It is the fact that the present case has not gone beyond the stage of pleading let alone a trial for judicial determination on the merits. If the defendant's argument is accepted, it means that the defendant will stand to enjoy the windfall of not having to defend the plaintiff's action that had been dismissed without any judicial consideration on the merits.

[11] The case of *Tee Ha Leong*, *supra*, concerned a situation where the plaintiff was absent on the day of trial and there being no counterclaim, but both defendants were present at the trial, the court dismissed the plaintiff's case with cost. The plaintiff then applied for reinstatement. The High Court distinguished the striking out of an action and dismissal of an action and held that if the case is struck out, O. 35 r. 2(1) of the RHC can be utilised to apply for reinstatement. But when the case is dismissed, the avenue open to the aggrieved party is to appeal. This is based on the rational that the case was already heard on merits.

[12] However, in *Yogananthy AS Thambaiya v. Idris Othman* [2010] 5 CLJ 654; [2010] 5 MLJ 576, the appellant's counsel was absent at hearing but the respondent's counsel and his witnesses were present. The court allowed the respondent's application to dismiss the appellant's claim and entered judgment for the respondent on the counterclaim. The next day, the appellant applied (1) to reinstate the appellant's claim; and (2) to set aside the judgment on the counterclaim. Both applications were dismissed. On appeal to the Court of Appeal, the court allowed the appeal with costs.

[13] The Court of Appeal held, amongst others, that O. 35 r. 2 of the RHC confers a wide discretion to set aside any judgment or order obtained where one party does not appear at the trial. The court in dealing with such application must look at the reason for the party's absence. The Court of Appeal held that the trial judge failed to consider the reason for the appellant and her counsel's absence and her defence to the counterclaim in dealing with the appellant's application.

[14] On the authority of *Yogananthy*'s case, it is my understanding that even in a case where the court has dismissed an action without judicial consideration on the merits of the case, appeal is not the only avenue to the injured party.

[15] There are legal writing and authorities which expressed that "unless" order is a peremptory order of the court that must be complied with and its breach should automatically attract the penalty prescribed in the order. See, the *Supreme Court Practice,* vol. 1, 1997, *Reiss v. Woolf* [1952] 2 All ER 112.

[16] Does it mean that the party who has failed to comply with the "unless" order must face the punishment flowing from the default with no hope to be let off? From the review of the following cases, the answer must be in the negative.

[17] In *R v. Bloomsbury and Marylebone County Court, ex parte Villerwest Ltd* [1976] 1 All ER 897, Lord Denning MR said at p. 900:

> I have one further observation to make. It is about *Whistler v. Hancock*. It seems there to be suggested that if a condition is not fulfilled the action ceases to exist, as though no extension of a time can be granted. I do not agree with that line of reasoning. Even though the action may be said to cease to exist, the court always has power to bring it to life again by extending the time.

[18] In *Samuels v. Linzi Dresses Ltd* [1981] 1 QB 115, the Court of Appeal held that there was power to extend time after a party had failed to comply with an unless order, but that the power should be exercised cautiously and with regard to the necessity for maintaining the principle that orders are made to be complied with and not to be ignored. Primarily it is a matter for the discretion of the master or the judge in chambers whether the necessary relief should be granted or not. The court, however, did not give guidance on the principles that the court must consider in exercising the discretion to extend the time for compliance.

[19] A decade later, the issue on the consequences of non-compliance with "unless" order arose again for consideration in the Court of Appeal in the case of *Re Jokai Tea Holdings Ltd (Note)* [1992] 1 WLR 196; [1993] 1 All ER 630, where Sir Nicolas Browne-Wilkinson V-C said at p. 37:

> In my judgment, in case in which the court has to decide what are the consequences of a failure to comply with an unless order, the relevant question is whether such failure is intentional and contumelious. The court should not be astute to find excuses for such failure since obedience to orders of the court is the foundation on which its authority is founded. But, if a party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, such failure to obey is not to be treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have enjoyed.

[20] *Re Jokai* shows that the court, when exercising the discretion to extend the time for compliance with the "unless" order, must consider the character of the defaulter's conduct, in particular whether it is contumacious, to ensure the punishment fits the breach.

[21] In *Hytec Information Systems Ltd v. Coventry City Council* [1997] 1 WLR 1666, after reviewing a long list of authorities including *Jokai Tea Holding*'s case, *supra*, Ward JL summarised the test for striking out the proceeding for failure to comply with the "unless" order in these words:

> (1) An unless order is an order of last resort. It is not made unless there is a history of failure to comply with other orders. It is the party's last chance to put his case in order. (2) Because that was his last chance, a failure to comply will ordinarily result in the sanction being imposed. (3) This sanction is a necessary forensic weapon which the broader interests of the administration of justice require to be deployed unless the most compelling reasons is advanced to exempt his failure. (4) It seems axiomatic that if a party intentionally or deliberately (if the synonym is preferred) flouts the order then he can expect no mercy. (5) A sufficient exoneration will almost inevitably require that he satisfies the court that something beyond his control has caused his failure to comply with the order. (6) The judge exercises his judicial discretion in deciding whether or not to excuse. A discretion judicially exercised on the facts and circumstances of each case on its own merits depends on the circumstances of that case; at the core is service to justice. (7) The interests of justice require that justice be shown to the injured party for the procedural inefficiencies caused by the twin scourges of delay and wasted costs. The public interest in the [*271] administration of justice to contain those two blights upon it also weighs very heavily. Any injustice to the defaulting party, though never to be ignored, comes a long way behind the other two.

[22] *Re Jokai Tea Holding*'s case and *Hytec Information*, *supra*, has been followed in our courts. See *Md Amin Md Yusof & Anor v. Cityvilla Sdn Bhd* [2004] 3 CLJ 88; [2004] 4 MLJ 446 (CA) where Nik Hashim JCA (as he then was) said:

> 13 O. 34 r. 7 provides for the discretionary power of the judge to make such order against the defaulting party 'as meets the ends of justice' should any party fail to comply with any direction given by the judge at any pre-trial case management conference. [14] Whilst it is true that a party's action or counterclaim could

A be struck out for non-compliance with a peremptory or an unless order of the court, the order would not be made unless there is a history of failure to comply with other orders. A peremptory or an unless order is an order of last resort (see *Hytec Information Systems Ltd v. Coventry City Council* [1997] 1 WLR 1666 at p. 1674H). Surely, it would not meet the ends of justice if the order made results in a miscarriage of justice. Therefore, all the circumstances of the case, inclusive of whether the failure to comply with the peremptory or unless order was indeed intentional and contumelious, should be looked at by the judge before penalizing the defaulting party (see *In re Jokai Tea Holdings Ltd* [1992] 1 WLR 1196 (CA)).

[23] It can be seen from the authorities aforementioned that an "unless" order does not preclude the court from hearing the defaulting party's application for extension of time for compliance with the order. Even if an action is dismissed or struck out due to operation of the unless order, the court has the power to "resurrect" it or, to borrow from Lord Denning MR in *R v. Bloomsbury*'s case, *supra*, "to bring it back to life by extending the time." To achieve this and to ensure that the punishment fits the default, the court must consider the character of the default's conducted, whether it was intentional or contumacious in failing to comply with the order.

[24] For all the reasons aforementioned, the court does not find that the Sessions Court has fallen into error in holding that the court is not *functus officio* and proceeded to hear the plaintiff's application for extension of time. Accordingly, this ground of appeal must fail.

Reasons For Delay

[25] On 30 September 2011, the Sessions Court gave directions to the parties on the filing of the affidavits in respect of the plaintiff's application for extension of time. The defendant did not file an affidavit in opposition and instead raised a preliminary objection on the issue of *functus officio* at the hearing of the plaintiff's extension of time application. The preliminary objection was dismissed and the Sessions Court allowed the plaintiff's application without considering the character or the conduct of the defaulter as shown in *Re Jokai*'s case, *supra*.

[26] Parker LJ in *Re Jokai*'s case, *supra*, opined that where the conduct of a defaulter could properly be described as contumacious or contumelious or in deliberate disregard of the order, the court should still consider whether the defaulters conduct was so heinous that the consequences flowing from the order were appropriate.

[27] Further, Sir John Negaw in *Re Jokai*'s case, explained that "contumacious" is the more apt adjective to test the defaulter's conduct ie, showing perverse and obstinate resistance to authority, rather than "contumelious" which means with "insolent reproach or abuse".

[28] In gist, the plaintiff's explanation for breaching the order is that he had to sort through about 141 invoices that went back to around 1995 for the present case as well as for the related case in the Magistrates' Court, and 14 days time period was not sufficient time for him to give the particulars sought by the defendant. His counsel had requested for extension of time to give the particulars/documents sought and the counsel for the defendant had kindly consented to give the plaintiff an extension of time to 21 September 2011 to give the particulars/documents.

[29] Learned counsel for the defendants submitted the Sessions Court has failed to exercise the discretion properly as it had failed to consider the plaintiff's long history of delaying the prosecution of its own claim as shown as follows:

(a) Delay in case preparation and evidence: failure to ensure invoices and documentary evidence must already be available, sighted and referred by the plaintiff and his counsel when drafting the statement of claim.

(b) Delay in commencing action and claim is statute barred: the alleged invoices relied on by the plaintiff date as far back as 1997, with the most recent one dated 2002 – all of which already statute barred when the action was instituted in 2011.

(c) Delay in applying for extension of time: the plaintiff did not attach any urgency to the matter when it only applied to court for an extension of time 17 days after the expiration of the 14 days stipulated by the court for compliance with its order.

[30] It is pertinent to bear in mind that there must be intentional or contumelious flouting of the order by the plaintiff. The court does not see this attitude being exhibited and quite to the contrary, there appears every intention to obey the order in that when the plaintiff realised that the time period given was insufficient, the plaintiff's counsel had sought extension of time from counsel of the defendant and consent was given. This was not challenged. The documents or particulars sought were given to the defendant *albeit* 11 days later. Even taking 16 days to file the application for extension of time cannot be considered as delay given the unchallenged fact that counsel for the defendant had earlier agreed to an extension to 21 September 2011.

[31] On the contention that the plaintiff's delay in case preparation and evidence and instituting the action which is now allegedly statute barred, suffice it to say that the action was instituted even before the order was made on 25 August 2012, it is non-starter to say that the delay are intentional or contumelious flouting of the order.

[32] In my judgment, the conduct of the plaintiff shows the plaintiff had taken the required steps in good faith to comply with the order but still not able to do so. He has, however, on 20 September 2012 (12 days from 10 September 2012 but before the expiry of the extended time agreed to by the defendant's counsel) delivered the particulars/documents sought by the defendant. In the premise, a punishment in accordance with the strict stipulation in the order will be too harsh and does not fit the breach.

Conclusion

[33] For all the reasons aforesaid, the court holds that the Sessions Court is not *functus officio* to hear the plaintiff's application for extension of time. Even though the plaintiff's action stood dismissed according to the strict term of the order, the court has the power to resurrect it. After examining the character of the breach which does not show intentional or contumelious flouting of the order, an order of extension of time as prayed for by the plaintiff is in place.

[34] Accordingly, the court dismisses the appeal with costs.